

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LEW WARDEN,

Plaintiff and Appellant,

v.

DUDLEY HOFFMAN MORTUARY
et al.,

Defendants and Respondents.

2d Civil No. B206840
(Super. Ct. No. 1198549)
(Santa Barbara County)

LEW WARDEN,

Plaintiff and Appellant,

v.

DUDLEY HOFFMAN MORTUARY
et al.,

Defendants and Appellants.

2d Civil No. B207353

Lew Warden contracted with Dudley Hoffman Mortuary for the cremation of his wife's remains. Subsequently, he came to believe that she was cremated with the remains of another person and that the mortuary stole the gold from her dental crowns. He sued not only the respondent mortuary but many of its employees as well as others in

the funeral industry. By special findings, the jury specifically found, inter alia, that her body was not cremated with that of another and that no gold was removed from her remains.

Warden appeals from the judgment entered on the jury verdict in favor of Dudley Hoffman and five individuals on his complaint for unfair and deceptive acts and practices under Civil Code section 1770, desecration of human remains, breach of contract and breach of the implied covenant of good faith and fair dealing, tortious interference with contract, negligent and intentional infliction of emotional distress, and breach of fiduciary duty. He also appeals from directed verdicts in favor of three other defendants. In a separate appeal, Warden challenges the trial court's pretrial dismissal of the class action allegations in the complaint and a discovery cut-off order.

Defendants appeal from an order denying their motion for attorney fees under Civil Code section 1717 and Code of Civil Procedure section 2033.420.

We affirm the judgment in favor of defendants and reverse the order denying attorney fees.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The operative pleading is the second amended complaint (SAC) filed on October 13, 2006, seeking damages, injunctive relief and attorney fees. The complaint alleges that respondents Dudley Hoffman Mortuary, Janice Hoffman, Jeffrey Hoffman, Keith Grimsley, Richard Williams, David Jones (collectively "the Hoffman defendants"), the Association of California Cremationists ("Association"), and Reginald Duran mishandled the remains of appellant Lew Warden's wife, Nadja¹ before, during, and after her cremation. Warden alleges that the Hoffman defendants removed Nadja's gold fillings and commingled her ashes with those of other decedents. Warden also alleges that defendants are part of a statewide conspiracy to engage in such misconduct and conceal it from the public. The complaint was filed as a class action.

¹ We refer to Mrs. Warden by her first name for clarity, not out of disrespect.

Prior to trial, the court dismissed the class action allegations of the complaint because Warden failed to file a class certification motion. In January 2008, the case went to trial on Warden's individual claims. At the close of the evidence, the court granted the motions of the Association, Duran and Jones for directed verdicts. After deliberating approximately two hours, the jury returned a unanimous special verdict in favor of the remaining defendants on all causes of action. The trial court subsequently denied Warden's motions for judgment notwithstanding the verdict and a new trial. It also denied defendants' motion for attorney fees.

On appeal, Warden contends the trial court erred in dismissing the class action allegations of the complaint and refusing his request to conduct additional discovery to substantiate them. In a second appeal, Warden asserts that the trial court erred in finding that the contract between Warden and Dudley Hoffman for cremation services was not a contract of adhesion. Warden also contends the trial court made numerous errors concerning the admissibility of evidence, instructing the jury, using a special verdict form, and directing verdicts in favor of three of the defendants.²

Respondents contend the trial court erred in denying their motion for attorney fees because the action was based on a contract and they were the prevailing parties under Civil Code section 1717. They also assert they are entitled to attorney fees under Code of Civil Procedure section 2033.420 for Warden's failure to admit facts during discovery which he did not dispute at trial.

DISCUSSION

A. The Trial Court Did Not Err in Determining the Authorization for Cremation and Disposition Was Not Unconscionable and Did Not Contain an Invalid Exculpatory Clause

Warden asserts the authorization for cremation and disposition he signed authorizing Dudley Hoffman to cremate his wife, and particularly paragraph C permitting

² Prior to the date set for oral argument, Warden filed a motion under Code of Civil Procedure section 909 requesting that we make findings of fact. As that statute pertains only when an appeal is taken from a judgment entered after a non-jury trial, the motion is denied.

Dudley Hoffman to remove dental fillings from cremated remains, is void because it is unconscionable and a contract of adhesion and contains a void and unenforceable exculpatory provision.

Paragraph C of the authorization states: "The Authorized Representative(s) understand that due to the nature of the cremation process certain materials, including body prostheses, dental bridgework, dental fillings, or personal articles accompanying the remains will either be destroyed or will not be recoverable. Accordingly, the Authorized Representative(s) represent and warrant to the Company that such materials: (i) have been removed from the remains; (ii) may be removed from the remains and disposed of by the Company unless otherwise directed in writing by the Authorized Representative(s); or (iii) may be destroyed by the cremation process."

Unconscionability is a question of law subject to de novo review.
(*Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1369.)

"Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113.) An adhesion contract is "'. . . a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (*Ibid.*) A court must determine whether the contract falls outside the reasonable expectations of the weaker or adhering party. (*Ibid.*) But even if the contract is "'. . . consistent with the reasonable expectations of the parties, [it] will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable." [Citation.]" (*Ibid.*) For the court to exercise its discretion and refuse to enforce a contractual provision, the contract must be both procedurally and substantively unconscionable. (*Id.* at p. 114.)

A contract is procedurally unconscionable if (1) it is oppressive, meaning that it "arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice,'" or (2) it causes surprise, such as where a term is "hidden in a prolix printed form drafted by the party seeking to enforce the disputed

terms." (*A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486; compare *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 723.)

Warden asserts the authorization was unconscionable because paragraph C was in small print. In *Bennett v. United States Cycling Federation* (1987) 193 Cal.App.3d 1485, the court held that there are no specific rules governing the size or style of type or any other physical aspect of a release provision. The court held that the only limitations are that a release provision not be in such small type as to be unreadable, buried inconspicuously in undifferentiated text in a lengthy document, stated in language not reasonably comprehensible to a layman, or otherwise concealed or obscured. (*Id.* at pp. 1489-1490.) What is required is that the release be readable and not "so encumbered with other provisions as to be difficult to find." (*Id.* at p. 1489.) There is no requirement that any particular words be used, as long as the language clearly expresses the intent of the parties to release the defendant from liability for the event or condition which was the proximate cause of the injury suffered by the plaintiff. (*Sanchez v. Bally's Total Fitness Corp.* (1998) 68 Cal.App.4th 62, 66-67.)

Although the authorization for cremation and disposition was on a standardized preprinted form, the requisite elements of oppression and surprise are absent. The contract is not lengthy, the text of each paragraph, including paragraph C, is in identical type of a legible size and style, and is written in plain language. Paragraph C was neither hidden nor in any way rendered inconspicuous. Moreover, Warden admits he did not read the contract before signing it. This admission abrogates any claim of harm arising from the alleged illegibility of the contract.

Warden contends that when he signed the authorization he was very upset due to his wife's death and, therefore, the Hoffman defendants were required to orally explain the provisions to him. Warden's fragile emotional state at the time he entered into the contract, while understandable, is not relevant to a determination of whether it is unconscionable. (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 199.) A party's failure to read or understand an agreement he signs is not the responsibility of respondents. (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 622, fn. 4.) Warden has

not cited and we are not aware of any general duty owed by one contracting party to another to explain the other's legal rights in connection with an agreement. We must assume contracting parties are aware of their legal rights or will seek competent legal assistance where necessary. (*Id.* at pp. 622-623.)

Warden's assertion that he was required to sign the authorization in order to cremate his wife also is without merit. This was not a "take it or leave it" situation where he had no choice but to deal with respondents. He could have gone to a different crematory or disposed of his wife's body by means other than cremation. (See *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 767 [where party had access to alternatives, procedural unfairness of adhesive contract minimal].)

The provisions of the authorization were required by statute. (Health & Saf. Code, § 7051.)³ Although not entirely clear, Warden appears to contend that paragraph C is misleading and fraudulent because it does not expressly mention the removal of "dental gold." We disagree. The term "dental fillings" used in paragraph C is sufficiently broad to reasonably include fillings made of gold. (See, e.g., *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 552 [words in a contract are to be understood in their popular and ordinary sense unless the parties agree otherwise].)

Warden also asserts that paragraph C is an exculpatory clause and void under Civil Code section 1668, which provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or

³ Health and Safety Code section 7051 states: "Every person who removes any part of any human remains from any place where it has been interred, or from any place where it is deposited while awaiting interment or cremation, with intent to sell it or to dissect it, without authority of law, or written permission of the person or persons having the right to control the remains under Section 7100, or with malice or wantonness, has committed a public offense that is punishable by imprisonment in the state prison.

"This section shall not prohibit the removal of foreign materials, pacemakers, or prostheses from cremated remains by an employee of a licensed crematory prior to final processing of ashes. Dental gold or silver, jewelry, or mementos, to the extent they can be identified, may be removed by the employee prior to final processing if the equipment is such that it will not process these materials. However, any dental gold and silver, jewelry, or mementos that are removed shall be returned to the urn or cremated remains container, unless otherwise directed by the person or persons having the right to control the disposition."

negligent, are against the policy of the law." By its terms, paragraph C is not an exculpatory clause because it does not seek to avoid negligence liability for violating a statutory provision. To the contrary, it does nothing more than comply with Health and Safety Code section 7051 requiring a crematory to obtain authorization before removing foreign materials from cremated remains.

B. Exclusion of Evidence

Warden asserts the trial court erred in refusing his requests to augment his expert witness list, obtain handwriting exemplars from some of the defendants, and show witnesses certain photographs depicting cremated remains.

A trial court's ruling excluding evidence will not be overturned on appeal unless it can be shown that the trial court abused its discretion. (*People v. Williams* (2006) 40 Cal.4th 287, 317.) Under the abuse of discretion standard applicable to evidentiary rulings, we will not disturb the trial court's ruling and reverse the judgment ". . . unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919.)

1. The Court Did Not Err in Refusing to Permit Warden to Call an Expert Witness

Warden asserts the trial court erred in refusing to allow an expert witness to testify on his behalf concerning the legal and ethical obligations of morticians and cremationists. The argument is without merit.

The case was originally scheduled for trial on April 25, 2007. Thus, the discovery cut-off date was March 26, 2007. (Code Civ. Proc., § 2024.020, subd. (a).) Subsequently, the case was transferred to a different department. At a case management conference on March 21, 2007, Warden advised the court: "I don't have any discovery. My case is made. I'd go to trial tomorrow if I could get a courtroom."

At a case management conference on July 24, 2007, the court set a trial date of January 14, 2008. Contrary to Warden's statement that he had concluded discovery, on November 27, 2007, he attempted to augment his expert witness list. At a pretrial

conference on January 7, 2008, the court denied the request to augment but left open the possibility that, if the evidence warranted, the expert could be called as a rebuttal witness. After the defense expert witnesses testified, the court held a hearing on the issue of whether Warden's expert should be called as a rebuttal witness. When asked to give an offer of proof as to what the witness would testify to, Warden responded: "I stated my case. I said it before. You tell me that I can call him as a rebuttal witness. I gave you the evidence to rebut. I can't continue arguing with the judge all the time on this. I'm burned out on arguing with you, your honor. I made my record. You do what you want to do." The court again asked Warden to submit an offer of proof as to the expert's testimony. Warden replied: "I suspect Mr. Callahan will testify that that witness doesn't know what he's talking about . . . I don't know what [respondent's expert] knows of his own knowledge, really. I think he's covering for the industry just like Mr. Duran does, and they will say anything that they have to say and make any case they have to make in order to establish their point. [¶] Now, the jury has heard the evidence. If the court wants to rule this way or that way, I can't do any more to argue the case. You've heard the testimony. You saw [respondent's expert] give his testimony, and I rest my case on that. You heard him." Based on Warden's refusal to make an offer of proof, the trial court refused to allow Callahan to testify as a rebuttal witness.

Warden omits the above colloquy from his appellate brief, and argues that he gave "ample notice" to respondents, complied with the statutes, and there "[was] no reasonable ground for denial given by the court." Citing only evidence supporting his contentions and ignoring facts which support the court's ruling is contrary to the rules of appellate practice. (*Huang v. Cheng* (1998) 66 Cal.App.4th 1230, 1235, fn. 4; *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 28-29.) Warden also fails to explain how the failure to allow Callahan to testify resulted in prejudice. We deem the issue waived. (See, e.g., *Fox v. Kramer* (2000) 22 Cal.4th 531, 543 [appellate court may not reverse a judgment because of erroneous exclusion of evidence unless the substance, purpose, and

relevance of the excluded evidence was made known to the trial court by the questions asked, an offer of proof, or by any other means].)⁴

2. *The Court Did Not Err in Barring Warden from Obtaining Handwriting*

Exemplars from Respondents

During his examination of David Jones, the crematory operator, and Richard Williams, the licensed cremationist, Warden requested that they provide samples of their handwriting so he could compare them to the signatures on the cremation record for the day his wife was cremated. The court did not allow him to do so. Warden asserts he was entitled to handwriting exemplars from these witnesses because the cremation record was an important piece of documentary evidence and Dudley Hoffman was required to keep accurate records under Health and Safety Code section 8343.

Warden's argument has at least two flaws. Health and Safety Code section 8343, as Warden correctly asserts, requires a crematory to keep accurate records of cremations they perform. The statute, however, does not create a private right of action permitting a customer of a crematory to bring a civil suit based on inaccurate recordkeeping. Subdivision (k) of Health and Safety Code section 8343 indicates that the intent of the statute is to provide a record for the Cemetery and Funeral Bureau when it conducts its inspections. Determining whether a violation of section 8343 occurred is for the bureau to determine in a disciplinary proceeding under Business and Professions Code section 9725 et seq., not in a lawsuit brought by a private party. (Bus. & Prof. Code, § 9789; see *Hansell v. Santos Robinson Mortuary* (1998) 64 Cal.App.4th 608, 613 [power to control the conduct of crematories rests with the licensing authority].)

Even assuming that the accuracy of Dudley Hoffman's recordkeeping was properly at issue in the lawsuit, Warden was not entitled to handwriting samples where,

⁴ For the first time in his reply brief, Warden asserts that respondents waived any objection to his request to augment because they did not bring a motion for protective order. We do not review arguments raised for the first time in a reply brief. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Moreover, the record shows that before denying Warden's request, the court held a hearing at which both sides were given the opportunity to present their contentions. As noted above, the court ultimately denied Warden's expert witness designation based on his failure to make an offer of proof.

as here, there was other evidence authenticating the signatures on the cremation records. The Evidence Code enumerates various ways in which a document may be authenticated. (See Evid. Code, §§ 1401-1421.) Submitting a handwriting exemplar to the jury to compare it with writing on a questioned document is one way to do so. (Evid. Code, § 1417; *People v. Rodriguez* (2005) 133 Cal.App.4th 545, 554.) Matters such as content, location, or other circumstantial evidence may also show authentication. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [statutory methods not exclusive]; *Chaplin v. Sullivan* (1945) 67 Cal.App.2d 728, 734; Evid. Code, § 1410 ["Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved"].) A preliminary finding of authentication may be based on the contents of a writing under circumstances where it was "improbable that anyone could have forged [it]" (*Chaplin, supra*, at p. 734), and where it was "unlikely anyone other than [the alleged author] authored the notes." (*People v. Lynn* (1984) 159 Cal.App.3d 715, 735.) This method of authentication may apply if it is unlikely that someone other than the alleged author would have authored the document given the information it contained.

The initials appearing on the cremation record were "RW." Williams and Jeffrey Hoffman, the owner of the crematory, testified that the initials were Williams' and that Williams performed the cremations on the day Nadja was cremated. Williams, Hoffman and Jones testified that Williams performed the cremations because Jones, who would ordinarily have done so, was not at work that day. Moreover, at the time of the signing there was no intimation that a lawsuit would be filed. Thus, there was no reason for the respondents to forge Williams' signature. As the signatures on the cremation record were authenticated by persons with knowledge of the handwriting and the record was signed in circumstances where it was unlikely that a forgery occurred, the trial court did not abuse its discretion in refusing to allow Warden to obtain handwriting samples from the witnesses.

3. The Court Did Not Err in Barring Warden from Showing Witnesses Photographs Without First Providing a Foundation for Their Admission

When questioning Jeffrey Hoffman and David Jones, Warden asked them to view a photograph of bone fragments after the cremation process. When the court asked Warden to provide a foundation for the photograph, he said that he obtained it from the internet. The court properly refused to permit Warden to use a photograph for which no foundation was laid while questioning a witness. (See, e.g., *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521 [in the case of experimental evidence, the preliminary fact necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those of the actual occurrence].)

When questioning respondents' expert and David Jones, Warden asked them to view a photograph depicting gold crowns after the cremation process. When asked to provide foundation, Warden said he had purchased the crowns from e-Bay. For the reasons stated above, the court properly refused to permit the photograph to be shown to the witnesses.

C. The Court Did Not Err in Directing Verdicts for Respondents Jones, Duran and the Association

Warden asserts the court erred in directing verdicts for David Jones, Reginald Duran and the Association. They were named as defendants in the causes of action for unfair and deceptive practices, desecration of human remains, fraud and conspiracy to defraud, tortious interference with contract and negligent and intentional infliction of emotional distress.

"In ruling upon a defense motion for a directed verdict, the trial court is guided by the same standard used in evaluating a motion for a nonsuit.' [Citation.] Thus, a directed verdict is properly entered when "'the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.'" [Citation.] ""In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence

must be disregarded.'" [Citation.] 'A directed verdict is . . . subjected to de novo appellate review' and '"is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom.'"' (Fariba v. Dealer Services Corp. (2009) 178 Cal.App.4th 156, 174.) The power to direct a verdict in favor of the defendant exists where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. (Paterno v. State of California (1999) 74 Cal.App.4th 68, 102.)

David Jones was employed to monitor cremations and process cremated remains. The only admissible evidence produced at trial was that Jones was not working on the day that Nadja was cremated, and he had no involvement whatsoever in the wrongful conduct alleged by Warden. Nonsuit as to Jones was proper.

Reginald Duran was one of the founding members of the Association and was its executive director on the date that Nadja was cremated. Warden asserts it was error to direct a verdict in his favor because Duran had given a talk a number of years previously in which he said that dental gold was destroyed in the cremation process and nonrecoverable.

The undisputed evidence shows that Duran had no contact with Warden or any of the Hoffman defendants until approximately two years after Nadja was cremated. He was contacted by Dudley Hoffman in response to Warden's request that Nadja's remains be examined by an expert. Duran spoke by telephone to Warden on one occasion and offered to meet with Warden to examine the remains. Warden declined to meet with him. Warden produced no evidence whatsoever linking Duran with any of the wrongful conduct alleged in the complaint. Warden makes no argument at all in his appellate brief concerning the Association. The directed verdicts for Duran and the Association were proper.

D. Jury Instructions

Warden asserts the trial court erred in refusing to give instructions he proposed on the standard of care, conspiracy, adhesion contracts, res ipsa loquitur and

negligence per se. He also asserts the court erred in giving instructions concerning breach of contract and interpretation of contracts.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) "' . . . "A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]" [Citation.]'" (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1157.) A judgment may not be reversed on the basis of instructional error unless the error caused a miscarriage of justice and there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. (*Soule, supra*, at pp. 573-574.)

There is no rule of automatic reversal or "inherent" prejudice applicable to any category of civil instructional error, whether of commission or omission. "The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601; see also *Santina v. General Petroleum Corp.* (1940) 41 Cal.App.2d 74, 77 ["Where any error is relied on for a reversal it is not sufficient for appellant to point to the error and rest there"].)

Warden's argument on the issue of instructional error is limited to listing the jury instructions he believed were erroneously given or not given. He makes no attempt to discuss these instructions in any meaningful fashion. He further does not inform us how the trial court's purported errors in giving or not giving the instructions constituted prejudicial error.⁵ Accordingly, we treat the assertions of error as waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

⁵ For example, his sole assertion pertaining to the court's refusal to give the instructions he proposed was: "The court's failure to give these instructions, so critical to appellant's case already minimized by the court's restrictions on his production of evidence, gave the jury a completely distorted view of appellant's theories of liability and was highly

E. The Verdict Form

Warden asserts the court erred in using a special verdict form as it did not properly resolve the factual issues presented by the evidence. The use of a special verdict form and the questions included in it are reviewed for abuse of discretion. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 364.) "Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear." (*Mortensen v. Southern Pac. Co.* (1966) 245 Cal.App.2d 241, 244.)

Warden complains that the following issues of fact were not presented to the jury for resolution-- "Did the defendant take [decedent's] dental gold, with or without express written authorization? Did they cremate her body with that of another person, with or without express written authorization? Did they commingle her cremated remains with the cremated remains of another person, with or without express written authorization? Was the Authorization for Cremation and Disposition (Exh. 112) a fraudulent, deceptive document?"

The record belies this assertion. The verdict submitted to the jury contained the exact questions Warden asserts were omitted: "Did Defendants intentionally misrepresent a material fact regarding the cremation of Nadja J. Warden to Plaintiff? . . . Did Defendants intentionally desecrate the human remains of Nadja J. Warden by removing dental gold from her cremated remains? . . . Did Defendants intentionally desecrate the human remains of Nadja J. Warden by cremating her with another human being? . . . Did Defendants intentionally desecrate the human remains of Nadja J. Warden by commingling her cremated remains with those of another human being? . . . Were Defendants negligent in the cremation of Nadja J. Warden? . . . Did Defendants breach the contract with Plaintiff for the cremation of Nadja J. Warden? . . .

prejudicial." With respect to instructions that were given over his objection, he argues: The court should have told the jury that Warden's case rested upon an implied contractual term that cremation be performed according to California statutes. "The court should have told the jury this expressly rather than casting them adrift on veiled and readily misinterpreted language [of the express contract]."

Did Defendants act outrageously or with reckless disregard for the probability Plaintiff would suffer emotional distress?" The jury answered "No" to each inquiry.

In addition, as with most of Warden's other assertions of error, he has not made any attempt to show how he was prejudiced by the purported improper verdict form. After complaining that the verdict did not ask the jury to make findings of fact, Warden then inexplicably argues that the verdict contains improper conclusions of law. We disagree. The questions in the verdict form were directed to the factual issues raised by the pleadings and the evidence.

F. The Appeal of the Order Regarding Class Certification Is Moot

We generally must dismiss an appeal if the issue has been rendered moot by the occurrence of events pending the appeal. (*Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.) Specifically, if intervening events make it impossible for the reviewing court to grant appellant effective relief, the appeal ordinarily should be dismissed. (*Ibid.*; *Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178-1179.) "The policy behind this rule is that courts decide justiciable controversies and will normally not render advisory opinions." (*Ebensteiner*, at p. 1179.)

A representative plaintiff in a class action lawsuit possesses only a single claim for relief--the plaintiff's own. That the plaintiff has undertaken to also sue "for the benefit of all" does not mean that the plaintiff has somehow obtained a "class claim" for relief that can be asserted independent of the plaintiff's own claim. "[T]he right of a litigant to employ [class action procedure] is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot . . . the court retains no jurisdiction over the controversy of the individual plaintiffs." (*Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 332.) Where, as here, a plaintiff's individual claims have been adjudicated against him, his class action claims do not

survive. The appeal challenging the decision to dismiss the class claims and related order denying discovery is dismissed as moot.⁶

G. The Court Erred in Denying Respondents' Request for Attorney Fees

Respondents contend the trial court erred in denying their request for attorney fees under Civil Code section 1717 and Code of Civil Procedure section 2033.420. The trial court denied fees under Civil Code section 1717 because it found that the action sounded in tort not contract. The court denied fees under Code of Civil Procedure section 2033.420 based on a finding that respondents did not incur any fees it would not otherwise have incurred due to Warden's failure to admit facts.

We independently review the legal question of entitlement to attorney fees by examining the applicable statutes, the contract and the complaint. (*Excess Electronix v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 705, 708.)

Code of Civil Procedure section 1021 provides, in pertinent part, "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys . . . is left to the agreement, express or implied, of the parties" Civil Code section 1717, subdivision (a) provides that "[i]n any action on a contract, where the contract specifically provides that attorney's fees . . . , which are incurred to enforce that contract, shall be awarded . . . to the prevailing party, then the party who is determined to be the party prevailing on the contract, . . . shall be entitled to reasonable attorney's fees" Subdivision (b)(1) of Civil Code section 1717 defines the "prevailing party" as "the party who recovered a greater relief in the action on the contract."

In determining whether a party has prevailed, the trial court "compare[s] the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 876.) Where

⁶ Warden's brief contains an argument that the trial court erred by orally granting respondents' motion for judgment on the pleadings. We do not consider this argument because the written order from which the appeal is taken does not purport to adjudicate any motion for judgment on the pleadings.

there has been a "simple, unqualified win," the court has no discretion to deny attorney fees to the prevailing party. (*Ibid.*)

Respondents assert they are entitled to attorney fees based on language in the authorization for cremation and disposition stating: "I . . . agree to protect and indemnify Dudley-Hoffman Crematory-Columbarium or its assigns, against any claims of damages which may result on account of this authorization or my . . . failure to properly identify or pick up said cremated remains, including legal fees and costs and expenses of litigation."⁷

Although the complaint contains some claims that sound in contract and others in tort, each is based on the same alleged wrongdoing--commingling remains and stealing gold crowns. "[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.) For example, a provision in a contract that states "in any 'lawsuit or other legal proceeding' to which 'this Agreement gives rise'" has been held broad enough to encompass recovery of attorney fees for tort claims. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342-1343; see also *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1796-1797 [contract providing for recovery of attorney fees "'In any legal action brought by either party to enforce the terms hereof . . .']").) The language in the authorization is broad enough to provide a basis for awarding attorney fees on the contract as well as the tort claims as it provides for the recovery of attorney fees for defending against "any claims of damages which may result on account of this authorization."

⁷ Warden argues that the authorization was not at issue in the litigation and that the jury only found that respondents did not breach the contract for crematory services which does not contain an attorney fee provision. This argument ignores both the allegations in his complaint and his objective in filing the lawsuit, i.e., respondents' cremation and disposition of his wife's remains in an unauthorized manner. This is precisely the subject matter of the contract at issue here.

In addition, a prevailing party is entitled to fees for work done on noncontract claims if the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units. (See, e.g., *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 [defense of contract, tort and RICO claims so intertwined that separation of time "'impracticable, if not impossible, . . .'" to achieve]; see also *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1085-1086 [time spent on non-fee shifting claims were determinative of fee-shifting claims and thus compensable]; *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1608 [successful party may recover fees for work on overlapping claims].) The attorney provision contains broad language encompassing both contract and tort claims. As respondents obtained a jury verdict in their favor, they were entitled to attorney fees and the trial court erred in denying them. (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1247; *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1398-1399.)⁸

CONCLUSION

The order denying attorney fees is reversed and remanded to the trial court to award fees in accordance with this opinion. All other orders and judgments are affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

⁸ Our decision that respondents are entitled to attorney fees under Code of Civil Procedure section 1021 and Civil Code section 1717 makes it unnecessary to determine their entitlement to fees under Code of Civil Procedure section 2033.420.

Timothy J. Staffel, Judge
Superior Court County of Santa Barbara

James M. Warden for Plaintiff and Appellant Lew Warden.

Hardin & Coffin, LLP, and Kristine L. Mollenkopf for Defendants and
Appellants Dudley Hoffman Mortuary et al.